

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONZELL GALVIN,

Defendant-Appellant.

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UNPUBLISHED

May 17, 2005

No. 253406

Bay Circuit Court

LC No. 02-010692-FC

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant Donzell Galvin appeals as of right from his jury trial convictions of two counts of first-degree murder.<sup>1</sup> Defendant was sentenced to two concurrent life sentences without the possibility of parole. Defendant's convictions arose from the murders of his ex-girlfriend, who was the mother of his two young children, and her mother. Defendant's only claim on appeal is that he was denied his Sixth Amendment right to counsel because his waiver of that right was not unequivocal or voluntary. We affirm.

**I. Factual Background**

Defendant had three different court-appointed attorneys in this case. Defendant's first attorney was allowed to withdraw, at defendant's request, upon the trial court's finding that there was a legitimate difference of opinion on fundamental trial tactics.<sup>2</sup> The trial court warned defendant that dismissal would delay his trial and that similar future requests would be considered suspect. The trial court also informed defendant that his right to counsel did not

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<sup>1</sup> MCL 750.316(1). Defendant was convicted on alternate theories of premeditation, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b). Based on the felony murder theory, his convictions for first-degree criminal sexual conduct, arson of a dwelling house, and first-degree home invasion were vacated to avoid double jeopardy concerns.

<sup>2</sup> Defendant initially asserted that counsel was not diligently seeking evidence. After counsel's first motion to withdraw was denied, defendant later contended that counsel lied to him, accused defendant of being homosexual, and accused his attorney of working with the prosecutor.

include the right to appointed counsel of his choosing.<sup>3</sup> Defendant's second appointed attorney was also allowed to withdraw on defendant's request.<sup>4</sup> In a letter to the court, defendant asserted that he would prefer to represent himself rather than accept this attorney's representation. At the hearing on the motion to withdraw, however, defendant stated that he was not waiving his right to counsel as he was unable to fully represent himself. While granting the motion, the trial court repeated its warnings to defendant.<sup>5</sup>

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<sup>3</sup> Specifically, the court informed defendant:

. . . Now, I also want to let you know, sir, that you don't get to choose an appointed counsel of your choice.

In other words, coun—counsel will be appointed for you, and whoever that counsel is, ah, absent good reason, that counsel will remain your lawyer absent a good reason to allow that tor-attorney to withdraw.

You don't get to choose your own lawyer unless you hire an—a lawyer of your own—of your own choice at your own expense, of course. Then you get to choose your lawyer.

But as far as court-appointed attorneys, they're rotated on a list and you would get, ah, you'd be part of that pool, rotational pool, and you get an attorney appointed to represent you.

And you may not like your new attorney, but I'm just tell—I'm forewarning you now here, that if I grant your motion, the next time, if there is a next time, you come and ask me to allow your counsel to withdraw as your counsel, I may say no at that point in time because you've already had Mr. Hess and you've asked him to withdraw, and if you come along and ask a—about a second lawyer to withdraw, I may not simply grant it unless you have a really good excuse.

<sup>4</sup> This attorney had been appointed to represent defendant in a criminal matter ten years earlier. Defendant accused counsel of losing information to the detriment of his previous case, of failing to vigorously defend him, and of "sending" him to prison on "bogus" charges. Defendant alleged that counsel was not working on his current case, failed to return his calls, and failed to secure copies of his preliminary examination transcripts.

<sup>5</sup> In denying counsel's first motion to withdraw, the court warned defendant as follows:

Well, Mr. Galvin, I indicated to you when I allowed Mr. Hess to withdraw as your counsel that the next time I received such a motion I would look at it with a [sic] extremely jaundiced eye as to whether or not I would grant such a motion to allow defense counsel to withdraw.

\* \* \*

(continued...)

Eric Proschek was then appointed to represent defendant. Only one month later, Mr. Proschek filed a motion to withdraw based on a breakdown in the attorney-client relationship. Rather than consider the motion to withdraw, the trial court ordered a psychological examination, over defendant's objections, to determine if defendant was competent to stand trial.<sup>6</sup> At the conclusion of the subsequent competency hearing, at which the trial court found defendant competent to stand trial, defendant requested substitute counsel. The trial court denied this request.<sup>7</sup> Defendant asserted that he would prefer to represent himself rather than continue with his current counsel. Specifically, defendant contended that Mr. Proschek was racist and would not represent him "to his best ability." After interjecting several heated comments during a discussion regarding the scheduling of trial, defendant asserted, "I'll represent myself. This is some bull-crap, get stuck with a racist attorney." As this comment was spontaneous, the trial court gave defendant one week to reconsider and talk with his attorney before considering his motion.

## II. Legal Analysis

In *People v Russell*,<sup>8</sup> our Supreme Court held that a trial court may not permit a defendant to represent himself unless the defendant has unequivocally waived the right to counsel, not just rejected court-appointed counsel.<sup>9</sup> "We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."<sup>10</sup> Before determining that a defendant has effectively waived his right to counsel, the trial court:

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(...continued)

You're faced with, obviously, murder in this case, and I hesitate to invite you to represent yourself if that's what you want to do, but that's probably a step that you're looking at if you continue to ask counsel to withdraw.

. . . I'm not gonna let you simply pick and choose your attorney, and every time you want to come to—you decide that you want to have a—a disagreement with your attorney, you're filing a motion to withdraw. I'm not gonna permit it in this case.

<sup>6</sup> Mr. Proschek suggested that defendant would be unable to cooperate with any attorney due to his paranoia. He noted that defendant had requested the dismissal of three appointed attorneys in a matter then pending before the probate court, had accused other attorneys of being racist and working with the prosecution, and refused to share information with counsel in order to prepare his defense while accusing counsel of inadequate representation.

<sup>7</sup> Defendant asserted that he intended to seek "relief from a higher court," but did not appeal the trial court's denial of his motion for substitute counsel at that time.

<sup>8</sup> *People v Russell*, 471 Mich 182; 684 NW2d 745 (2004).

<sup>9</sup> *Id.* at 187-191, 194.

<sup>10</sup> *Id.* at 187.

must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.<sup>[11]</sup>

The trial court must also comply with MCR 6.005(D) which requires the court to advise "the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation," and offer the defendant the opportunity to consult with appointed counsel.<sup>12</sup> The trial court must substantially comply with these requirements or the defendant's waiver is not effective.<sup>13</sup>

Following defendant's competency hearing, the trial court conducted a hearing to determine if defendant intentionally, voluntarily, and unequivocally waived his right to representation. Plaintiff noted that he consulted with Mr. Proschek and affirmatively reiterated his desire to represent himself because he could not secure proper representation from his appointed attorneys. Following extensive and detailed questioning, defendant indicated that he understood that he had a right to representation. He stated that he understood the serious nature of the charges against him and his potential sentence. The court insured that defendant understood the dangers and duties of representing himself.<sup>14</sup> The trial court fully explained the nature of stand-by counsel, and defendant asserted that he understood, as he had also represented himself with the assistance of stand-by counsel in the probate court matter.<sup>15</sup> Defendant stated that no one forced or coerced him into making this decision. He also promised not to disrupt the court proceedings. The trial court granted defendant's motion to represent himself and sua sponte appointed Mr. Proschek as stand-by counsel. Defendant felt that Mr. Proschek would hinder his case and fail to give him proper advice. However, the trial court denied his motion for

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<sup>11</sup> *Id.* at 190, citing *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). See also *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

<sup>12</sup> MCR 6.005(D); *Russell*, *supra* at 190-191.

<sup>13</sup> *People v Adkins (After Remand)*, 452 Mich 702; 551 NW2d 108 (1996), overruled in part on other grounds *People v Williams*, 470 Mich 634; 683 NW2d 597 (2004).

<sup>14</sup> The judge warned defendant that the jury may view his self-representation negatively, that he was uneducated in the rules of evidence and basic trial procedure, that he would be completely responsible for all aspects of his defense, and that he may have difficulty preparing for trial while incarcerated.

<sup>15</sup> The probate court matter related to the termination of defendant's parental rights to his two minor children based upon his incarceration for the alleged murder of their mother. Although defendant challenged the effectiveness of his third appointed attorney's representation in that case, defendant did not appeal the probate court's denial of his request for a fourth appointed attorney resulting in his self-representation. See *In re Darby/Galvin*, unpublished memorandum opinion of the Court of Appeals, issued December 21, 2004 (Docket No. 255515).

substitute stand-by counsel, as defendant made no specific allegations regarding the inadequacy of Mr. Proschek's representation.<sup>16</sup>

At this hearing, defendant validly waived his right to counsel. Defendant made a clear and unequivocal request to represent himself. The trial court's detailed questioning insured that defendant understood the disadvantages of self-representation and that his self-representation would not disrupt or burden the court. Defendant was also given all the advice and protections afforded by MCR 6.005(D).

The trial court also properly complied with MCR 6.005(E) by affirming at all subsequent proceedings that defendant intended to continue to represent himself. At each subsequent pretrial hearing, the court reminded defendant that he had a right to counsel, not necessarily of his choosing, and asked if defendant continued to waive this right. At the first pretrial hearing, defendant asserted that he "only waived [the right] because I had no choice." The court reminded defendant that he had failed to show grounds for Mr. Proschek's dismissal and chose to represent himself. Defendant indicated that he would continue to represent himself "unless I can get another attorney." In a hearing on a motion for discovery, affirmatively expressed his intent to represent himself.<sup>17</sup> However, at the close of the next hearing, defendant asserted that he no longer wanted to represent himself. He renewed his motion for substitute counsel, which was, again, denied. The court noted:

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<sup>16</sup> Defendant specifically asserts in his brief on appeal that he is *not* challenging the trial court's refusal to appoint substitute counsel to replace Mr. Proschek. However, we note that the trial court properly denied this request. An indigent defendant has the right to appointed counsel, but is not entitled to pick and choose his attorney. *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003), citing *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). A trial court may appoint substitute counsel where there is "a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Defendant failed to raise specific allegations for the trial court, or this Court, to find that he was entitled to the appointment of substitute counsel. *Id.* at 463, citing *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989) (mere allegations that a defendant lacks confidence in this attorney are insufficient to form good cause for the substitution of counsel). Furthermore, defendant's purposeful refusal to cooperate with appointed counsel resulting in the lack of an attorney-client relationship is not good cause to support such an appointment. *Id.* at 462, quoting *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). We also note that the trial court was generous in twice appointing substitute counsel for defendant.

<sup>17</sup> The trial court repeatedly informed defendant at this hearing that he could reappoint Mr. Proschek to represent him. Defendant asserted on numerous occasions that he would represent himself.

I'm not denying your right to counsel. Ah, I'm denying your right to counsel that you want to choose. You have—you went through three lawyers in this proceeding, and my understanding, ah, is that you went through, I think, three lawyers in the Probate Court proceeding.

You apparently don't trust anyone to represent you—or at least anyone that is appointed to represent you. And I refuse to appoint a fourth lawyer to represent you based on the grounds you are giving me because I think they are fabricated.

However, defendant refused to accept Mr. Proschek as his appointed counsel.

At the beginning of defendant's trial, the court again asked whether defendant wanted to represent himself or have his stand-by counsel appointed as trial counsel. The court briefly reminded defendant of the hazards of self-representation. Defendant affirmatively reasserted that he wished to represent himself. Defendant continued through his trial with Mr. Proschek's assistance as stand-by counsel.

In most cases, the requirements of MCR 6.005(E) are “adequately met by the judge telling the defendant that in the upcoming proceeding he has the right to an attorney, at public expense if necessary, and asking the defendant whether he wishes to have an attorney or continue to represent himself.”<sup>18</sup> Defendant was repeatedly informed of his right to counsel throughout these proceedings. Although defendant invoked his right to counsel at the close of one pretrial hearing, he refused court-appointed counsel and reinstated his waiver at the start of trial following further questioning in compliance with *Russell*, *Anderson*, and the court rule. The trial court's efforts to insure that defendant wanted to continue to represent himself were more than adequate.

Defendant contends that he is entitled to a new trial in light of *Russell*. In *Russell*, however, the defendant repeatedly requested that he be represented by counsel and *never* asserted his right to represent himself.<sup>19</sup> In this case, defendant made a clear request to represent himself. The court gave defendant a week to reconsider and held an extensive hearing on the matter. At the hearing, defendant was properly informed of his right to counsel and of the hazards of self-representation. Despite defendant's brief change of heart, he nevertheless

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<sup>18</sup> *People v Lane*, 453 Mich 132, 137-138; 551 NW2d 382 (1996).

<sup>19</sup> *Russell*, *supra* at 192.

unequivocally and knowingly reinstated his waiver of the right to counsel before trial. Accordingly, the trial court properly found, over and over, that defendant had validly waived his right to counsel.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra